Supreme Court, U.S.
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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
____ TERM, 1998

STEVEN J. SALGEURO, Petitioner
v.
PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

On Petition for a Writ of Certiorari to the
Appellate Department, Superior Court of California,
County of Alameda

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER A VIOLATION OF THE RIGHT TO HAVE A JURY DECIDE ALL ELEMENTS OF THE OFFENSE IS A CONSTITUTIONAL DEPRIVATION UNDER THE FIFTH AND SIXTH AMENDMENTS THAT SUBSTANTIALLY AFFECTS THE RIGHTS OF A CRIMINAL DEFENDANT.

PARTIES TO THE PROCEEDING

Parties to the proceeding at trial and on appeal were petitioner and defendant Steven J. Salguero and the People of the State of California represented by Thomas J. Orloff, District Attorney, County of Alameda, State of California.

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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

____ TERM, 1998

STEVEN J. SALGEURO, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

On Petition for a Writ of Certiorari to the

Appellate Department, Superior Court of California,

County of Alameda

Petitioner Steven J. Salguero respectfully petitions for a writ of certiorari to review the judgement of the Superior Court of the State of California in and for the County of Alameda, Appellate Department, in this case.

OPINIONS BELOW

The Superior Court of California, County of Alameda, Appellate Department affirmed the judgement of the trial court without issuing an opinion.

BASIS FOR THIS COURT'S JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257, subdivision (a) on the grounds that his rights under the Fifth, Sixth, Seventh, and Fourteenth Amendments of the United States Constituion were violated.

Petitioner was tried by a jury for violations of California Penal Code sections 71 and 148(a) in the Municipal Court for the San Leandro-Hayward Judicial District, County of Alameda, State of California on March 3, 1997. The jury found petitioner guilty on both counts on March 7, 1997. See Appendix A. An appeal of the verdict was heard in the Appellate Department, Superior Court of California, County of Alameda on December 19, 1997. The Superior Court, Appellate Department, entered its order rejecting Petitioner's appeal on December 23, 1997, see Appendix B and denied Petitioner's petition for rehearing and application for certification to the Court of Appeal of California, First Appellate District pursuant to Cal. Rules of Court 63 on January 15, 1998. See Appendix C.

The judgment below became final when the petitioner's application for certification to the California Court of Appeals was denied by the Superior Court, Appellate Department. Under the California Rules of Court, the judgment of a Superior Court, Appellate Department, may be heard by a California Court of Appeals in two instances: (1) when the Court of Appeal on its own motion certifies transfer of a published appellate department opinion or (2) when the Superior Court, Appellate Department, transfers a

case on the application by a party. Cal. Rules of Court 62 and 63. In petitioner's case, there was no published appellate department opinion. Petitioner's application for certification to the Court of Appeals was denied on January 15, 1998. In the absence of certification or a published opinion, no further appeal is authorized. In re Sterling, 63 C.2d 486, 487, 47 Cal.Rptr. 205, 407 P.2d 51 (1965). The denial of petitioner's application for certification to the Court of Appeals represents finality in state court. See Kuhns v. California, 419 U.S. 1066, 95 S.Ct. 652, 42 L.Ed.2d 662 (1974) (petitioner must seek certification of case to the Court of Appeal for this Court to have jurisdiction); Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (in which a petition for writ of certiorari to the Appellate Department, Superior Court of California was granted). Petitioner raises a constitutional claim after achieving a final judgment from the highest state court in which his case may be heard. Therefore, this Court has jurisdiction to hear this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution are involved:

The United states Constitution, 5th Amendment:

". . . nor be deprived of life liberty, or property, without due process of law . . ."

The United States Constitution, 6th Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

The United States Constitution, 7th Amendment:

In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The United States Constitution, 14th Amendment:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On February 5, 1996, as petitioner drove home to Hayward across the San Mateo Bridge, he received a page from his wife, Gloria Salguero. (III, 49:16-17)[1] The page repeated the numbers "911"; this is the code that petitioner uses with his wife to mean

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[1] All cites to the record are to the reporter's transcript. The reporter's transcript is in six separate volumes, five of the volumes are numbered and one is not. Because the unnumbered volume contains testimony that comes directly after Vol. II, it is referenced as Vol. II, part 2 throughout this brief.

extreme emergency. (III, 49:20-22) Petitioner called his wife. His wife, who was crying, told petitioner that a person had arrived at their house threatening to send her to jail and to take their granddaughter. (III, 50:3-6)

When petitioner arrived at his house, he saw his son and a strange man, Randy Morris, arguing. (III, 51:19-52: 5) Petitioner's son was right in Morris' face, screaming and yelling with gritted teeth. (II, 15:12-14) Morris was backed up on the porch away from the stairs. Petitioner's son's speech was "laced with profanity. Every third word was fucking goddamn, to that nature." (II, 15:23-24)

Morris identified himself to petitioner as a Child Protective Services (CPS) worker who was investigating a report that his granddaughter was hurt. (II, 19:9-13) Petitioner asked Morris if he had a search warrant and stated that without a search warrant Morris had no right to be on his property. (II, 20:16-18) Morris boldly replied that he did not need a search warrant because his job did not "require" him to have one. (II, 19:17-20)

Petitioner then told his son to go into the house. (II, 21:1-2) When the son refused, the father physically directed his son into the house and away from Morris. (II, 21:4-6) Unlike his son, petitioner stood "a foot or two away" from Morris and spoke to him in a "controlled rage." (II, 21:20-24) Giving his card to petitioner, Morris said that he was investigating a report that petitioner's granddaughter had been physically abused and that his "job is to make sure she's

okay." (II, 23:6-9) Although petitioner took offense at this accusation, he nevertheless called his granddaughter to come out on the porch. (II, 24:1-2) When the granddaughter appeared, petitioner asked Morris, "Does she look like an abused kid to you?" Morris replied, "No, she does not." (II, 24:23-25) Petitioner told his granddaughter that she was free to go back inside the house and she went back inside.

Morris told petitioner that his granddaughter "appears to be in good health and appears to be, like you said, someone who is not abused" (II, 26:11-13), but then asked to see the granddaughter again. At this point, petitioner went on a tirade about the racism that Hispanics suffered at the hands of "white people" and "white institutions" and "your" people "with your degrees and educations" walking all over "my people." (II, 26:19-27:4) When petitioner then asked if the conversation were being recorded, Morris assured him that it was not. (II, 27:12-27) Morris alleges that petitioner then said that if Morris did anything to disrespect his family that he would "whoop your fucking ass so bad that then your agency will have some evidence to be involved in my family's business." (II, 28:9-12)

Morris said that he took petitioner's words as a serious threat because (1) he was not able to get the "family" to calm down, (2) the "family way of communicating," (3) his "experience with the son," (4) "his experience" with the petitioner, (5) his "experience with the grandmother," (6) the fact that "allegations" of child abuse, and (7) that Morris had voluntarily given petitioner his business card. (II,

28:16-24) Of these seven factors that caused Morris to take petitioner's words seriously, only one was directly related to petitioner. Morris' experiences with the son and grandmother occurred before the petitioner arrived. Petitioner did not know what those experiences were. The allegations of child abuse did not name the grandfather as the suspect and were later determined to be unfounded. Finally, Morris gave his business card to petitioner on his own initiative.

Petitioner then told Morris to go, and Morris left. Neither had any contact with the other before the trial.

Later that evening, sheriff's deputies following up on a report from CPS that a social worker had not been able to complete his investigation arrived at the Salguero home. Mr. Salguero was arrested at that point for protesting the deputies' attempt to enter his home without a search warrant when, in response to their threat to arrest him, he said "Go ahead and arrest me." (II, part 2, 54:4-5)

At trial, the jury instructions used in the case defined a violation of California Penal Code section 71 as:

> (1) The defendant directly communicated to another person a threat to inflict an unlawful injury. (2) The person to whom the threat was communicated was a public officer or employee. (3) The threat was made with the specific intent to cause the public officer or employee to refrain from doing any act in the performance of his or her duties. (4) In making the

> threat, the Defendant caused or attempted to cause, such public officer or employee from performing his or her duties. (5) The recipient of the threat reasonably believed that such a threat could be carried out.

(IV, 11:25-12:8)

The jury, after deliberating, submitted a question to the court asking "Does a threat in the future count as a threat?" (IV, 20:8) Outside the presence of the jury, petitioner's trial counsel stated: "I think it's conditional. I'm not sure if it is a threat. Depends on what they mean. I'm not even sure what the question is. Seems vague." (IV, 20:10-16) The trial judge responded to counsel's concerns by saying, "A threat to do something in the future, I assume, *based on the testimony in this case*. I would assume the answer would be yes." (IV, 20:17-19) (emphasis added). The judge, after calling in the jury, asked the foreperson: "I assume that you mean, does a threat [to] do something in the future count as a threat. Is that what is meant here [?]" (IV, 20:25-27) Once the foreperson affirmed this assumption, the judge instructed the jurors that the answer to their question was "yes." (IV, 21:2). Under California law, there is no legal definition of a "future threat," nor is there a legal definition of "threat" as it is used in California Penal Code section 71. The word "threat" in this context carries its plain everyday meaning. Although, the meaning of the jury's inquiry is not clear, even the trial judge realized that this question involved a factual inquiry: the judge "assume[d], based on

the testimony in this case" that the answer was yes. (IV, 20:18)

B. WHEN THE QUESTION PRESENTED FOR REVIEW WAS FIRST RAISED

The question presented for review was first raised in petitioner's opening brief on appeal under California Penal Code section 1259 which permits California appellate courts to review any jury instruction even though no objection was made at the trial if the substantial rights of the defendant were affected.

Petitioner specifically raised the federal question in his claim that his Constitutional right to trial by jury was denied when the judge instructed the jury on an issue of fact. Petitioner claimed that the Due Process clause and the Sixth Amendment required each element of the offense to be decided by a jury, citing United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), as well as several California cases that given similar interpretations to the Constitution. Petitioner claimed that under any standard of review, the error was substantial and harmful. In the People's reply brief, the District Attorney did not address the Constitutional dimensions of this claim merely asserting without citing legal authority on point that the judge was merely helping the jury understand the definition of the word "threat" and that the issue was waived by trial counsel's failure to object. After oral arguments, the matter was submitted to the appellate court.

REASONS FOR GRANTING THE PETITION

A. THE QUESTION PRESENTED IS AN IMPORTANT FEDERAL ISSUE THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT

This petition raises the issue that this Court declined to address in United States v. Johnson, 117 S.Ct. 1544, 1549-1550 (1997): whether, in a criminal trial, the determination by a judge instead of the jury that an element of the offense has been proven beyond a reasonable doubt is a constitutional deprivation that substantially affects the rights of the defendant. This issue is an important question of constitutional law that has not been settled by this court. In Johnson, the Court noted that the constitutional deprivation of a right to have the jury determine each element of the offense could, by analogy, be compared to both constitutional errors that are classified as "structural error" and to constitutional deprivations that are categorized as "trial error." *Id.* This Court opined that the issue falls between the holding of Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), that an erroneous reasonable doubt instruction is structural error, and the decision in Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991), that failing to instruct on an element of the offense is subject to harmless error analysis. The difference between these two delineations is enormous. Structural errors which involve constitutional deprivations affecting the framework of the trial itself

are held to be prejudicial to the defendant as a matter of law. Arizona v. Fulminante, 499 U.S. 279, 307-310 (1991). Trial errors, on the other hand, which occur during the presentation of the case to the jury and may be quantitatively assessed in the context of other evidence, are subject to harmless error analysis before a finding of prejudice. Id.

Johnson dealt with the issue of how to analyze the error that occurs when a judge decides an element of an offense rather than a jury. In a prosecution for perjury under 18 U.S.C. section 1623, the judge at Johnson's trial decided the issue of the materiality of the false statements rather than submitting the issue to the jury. Johnson v. United States, *supra*, 117 S.Ct. at 1547. In an earlier case, this Court had decided that, under the Fifth and Sixth Amendments, "materiality," like all elements of an offense, must be decided by the jury. United States v. Gaudin, 515 U.S. 506, 522, 115 S.Ct. 2310, 2320 (1995)(affirming the Ninth Circuit's reversal of conviction at 28 F.3d 943 (1994)). Although Johnson failed to object to this issue, she was allowed to raise the issue on appeal because she was convicted before the decision in Gaudin but her appeal occurred post-Gaudin.[2]

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[2] At the time of this Court's decision in Gaudin, all Federal Circuit Courts except for the Ninth Circuit had held that the trial judge should decide the issue of "materiality." United States v. Gaudin, 515, U.S. at 509, 115 S.Ct. at 2313. Subsequently in Johnson, the Court held that plain error analysis applied when no objection was made in accordance with then-extant Circuit precedent.

Under those circumstances, this Court applied the four-pronged test for plain error review as set forth under Rule 52(b) of the Federal Rules of Criminal Procedure in United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The Olano test requires that, before an appellate court can correct an error not raised at trial, there must be (1) error (2) that is plain under current law and (3) that affects substantial rights; once these three conditions are met then the court must determine if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Johnson v. United States, *supra*, 117 S.Ct. at 1549. The Court declined to address the issue of whether the error was substantial because, assuming that the error affected substantial rights, it found that the fourth prong of Olano was not satisfied. *Id.* at 1550.

The standard of review used in California courts when the defendant fails to object to errors in jury instructions differs from that of the federal courts. Under California Penal Code section 1259, "[t]he appellate court may also review any instruction given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." *See also*, e. g., People v. Hannon, 19 C.3d 588, 138 Cal.Rptr. 885, 564 P.2d 1203 (1977) ("the Legislature has specifically provided that an objection is not required in order to preserve instruction issues affecting the substantial rights of a

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Johnson v. United States, supra, 117 S.Ct. at 1546.

defendant."), People v. Harris, 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240 (1981), People v. Andersen, 26 Cal.App.4th 1241, 32 Cal.Rptr.2d 442 (1994). Because the right violated here is a federally guaranteed Constitutional right, this Court has the authority to decide whether the violation is substantial. See Chapman v. California, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) Thus, in cases such as petitioner's where the defendant fails to object to a partially directed verdict, the constitutionality of the judge's conduct hinges on the one issue which this Court has not addressed: whether a partially direct verdict substantially affects the rights of the defendant.

In his concurring opinion in California v. Roy, 519 U.S. ---, 117 S.Ct. 337, 339, 136 L.Ed.2d 266 (1996), Justice Scalia, the only Justice who has expressed an opinion as to the harmfulness of a judge determining an element of the offense, opines that a criminal defendant is entitled to a *jury verdict* that he is guilty of *each necessary element* of the crime:

> The absence of a formal verdict on this point can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be

> sustainable on appeal; it requires an actual jury finding of guilty."

Id. (quoting Sullivan v. Louisiana, supra, 508 U.S. at 280). Justice Scalia's dissent underlines not only the importance of this issue, but also underscores the need of this Court to address this issue.

Petitioner respectfully requests that this court take up the unanswered question posed in Johnson and end the multitude of approaches to this issue. While declining to dispose of its previous decisions, this Court has outlined the importance of this question and its fundamental significance to all criminal trials.

B. THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL ARE IN CONFLICT ON THE QUESTION PRESENTED

On the issue presented by petitioner, the Federal Circuit Courts have a split of authority. The Seventh Circuit, when considering a charge of failing to register with the Selective Service, has found that such error is structural error:

> not only does the harmless-error doctrine not apply when the error consists in directing a verdict against a criminal defendant; it also does not apply when the judge directs a partial verdict against the defendant by telling the jury that one element of the crime -- such as guilty knowledge in this case -- has been proved beyond a reasonable doubt . . .

United States v. Kerley, 838 F.3d 932, 937 (1988)(citations omitted). The opposite conclusion was reached by the Eleventh Circuit in United States v. Fern, 117 F.3d 1298, 1307 (1997) when it held that judicial determination of an element of the offense "does not fall within that limited class of errors known as 'structural errors.'"[3] The Sixth Circuit has applied harmless error analysis to the issue of whether a directed verdict as to one element of the charge. United States v. Rogers, 118 F.3d 466, 472 (1997) (where the trial judge decided the materiality of a statement under 18 U.S.C. section 1001). Even though the Sixth Circuit applied a harmless error standard, the panel opined that they believe that the failure to submit an element of the charge to the jury could constitute "structural error." *Id.* at n. 5. The Second Circuit has hedged its bets and found that a partially directed verdict may be structural error in some instances but not in others depending on "the particular nature, context, and significance of the violation." United States v. Gonzalez, 110 F.3d 936, 946 (1997)(quoting Yarborough v. Keane, 101 F.3d 894 (2nd Cir. 1996)).[4] Such confusion at the Circuit level on this fundamental

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[3] Involving a judicial determination at trial that the materiality element of 42 U.S.C. section 7413(c)(2)(A) (making a false material statement, representation or certification under the Clean Air Act) was harmless error.

[4] In Gonzalez, the Circuit Court addressed the issue of whether failure to submit to the jury an element that had been stipulated to by the defense was a substantial error under the Olano analysis. The case involved a violation of 18 U.S.C. section 922(g)

issue necessitates that this Court address the issue.

HISTORICAL PERSPECTIVE

The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. United States v.Gaudin, *supra*, 515 U.S. 506, 522-523, 115 S.Ct. 2310, 2320. Although this basic right lies at the confluence between the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .," and the Fifth Amendment's Due Process Clause, which supports the contention that the prosecution must persuade the fact finder "beyond as reasonable doubt" of the facts necessary to establish each of those elements, *see Id.* and Sullivan v. Louisiana, supra, 508 U.S. 275, it was not explicitly established in our constitutional laws until Gaudin.

The right to have a jury decide each element of the offense beyond a reasonable doubt has been "from very early times insisted on by our ancestors," Gaudin, supra, 515 U.S. at 508, 115 S.Ct. at 2314, quoting 2 J. Story, Commentaries on the Constitution of the United States 540-1 (4th ed. 1873). However the concrete

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where the defendant stipulated to the predicate prior conviction and that the firearms had moved in and afected interstate commerce. United States v. Gonzalez, supra, 110 F.3d at 944.

establishment of this right as constitutionally required has occurred within the past thirty years. The right to trial by jury in serious criminal cases[5] was held to be Constitutionally required by the Fourteenth Amendment in Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In Duncan, however, the Court decline to state the precise role which a jury was to perform.

This Court did not hold that guilt must be found beyond a reasonable doubt until its decision in In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (juvenile delinquency hearings require guilt beyond a reasonable doubt) Winship, which reviewed a juvenile delinquency proceeding held before a judge, is silent on who must decide the issue of guilt. See Sullivan v. Louisiana, *supra*, 508 U.S. at 278 ("It would not satisfy the Sixth Amendment to . . . leave it up to the judge to determine (as Winship requires) whether he is guilty beyond a reasonable doubt"), compare Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583

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[5] Both charges, although misdemeanors, are serious charges punishable by more than six months imprisonment, and thus the Constitutional right to a jury trial attaches. See, Duncan v. Lousiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). The maximum punishment upon a first conviction under California Penal Code section 71 as a misdemeanor is a fine not exceeding ten thousand dollars ($10,000), imprisonment in the county jail not exceeding one year or both; the maximum under California Penal Code section 148(a) is a fine not to exceed one thousand dollars ($1,000), imprisonment in the county jail not to exceed one year, or both.

(1994) (citing Winship for the proposition that the government must prove beyond a reasonable doubt every element of a charged offense)[6] In Sullivan v. Louisiana, the Due Process Clause was finally held to prescribe that "[t]he prosecution bears the burden of proving all elements of the offense charged and must persuade the fact finder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements. *Supra*, 508 U.S. at 277-278. While the holding of Sullivan leads high up the mountain, this Court does not summit until Gaudin holds that the jury must determine beyond a reasonable doubt a defendant's guilt of every element of the crime with which he is charged. United States v. Gaudin, *supra*, 515 U.S. at 522-523, 115 S.Ct. at 2320. This right is so fundamental that it should be applied to the states. California v. Roy, *supra*, 519 U.S. ---, 117 S.Ct. at 339 (1996)(Scalia, J., concurring)

A corollary of this right is that, in a criminal case, a judge may not direct a verdict for the government. Sparf and Hansen v. United States, 156 U.S. 51, 105, 15 S.Ct. 273, 39 L.Ed.2d 343 (1895); see also United States v. Martin Linen Supply, 430 U.S. 564, 572-573, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1976) (citing Sparf) This rule also applies when a judge directs a partial verdict against the defendant by telling the jury that one element of the crime has been

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[6] Victor v. Nebraska, like most cases applying the holding in Winship, involves how the guilt beyond a reasonable doubt standard is applied though the jury instructions. See, among others, Patterson v. New York, 432 U.S. 211, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), Sullivan v. Louisiana, *supra*.

proved. United States v. Kerley, *supra*, 838 F.2d at 937 (citing Sandstrom v. Montana, 442 U.S.510, 523, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (instruction to jury that the law presumes the defendant acted "purposely or knowingly" is unconstitutional)). Jury instructions can be so radically defective as in effect to direct a verdict in whole or in part against the defendant. *Id.*

In answering the jury's question, the trial judge in petitioner's case answered in a way that had the same effect as a partial directed verdict against the defendant. When the trial judge replied "yes" to the question of whether a future threat is a threat, he performed a fact finding role that was exclusive to the jury. From the phrasing of the question itself -- "is a future threat a threat" -- the meaning of the word threat is not at issue. One cannot define a word by using that word in the definition. Such circular logic does not further the understanding of the jurors. The jury wanted the judge to answer the factual inquiry which they themselves could not decide: whether petitioner's words were a threat under the statute. The answer to such a query is a factual question concerning an element of a crime. The Constitution mandates that this question be decided by the jury, not the judge. The trial judge erred in answering this question as he did.

This Court has observed that "[p]articularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge."

Bollenbach v. United States, 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350 (1946). Furthermore, a jury's request for reinstruction lends substance to the conclusion that evidence of that element of the charge is far from overwhelming. Francis v. Franklin, 471 U.S. 307, 327, 105 S.Ct. 1965, 85 L.Ed.2d 629 (1985) When a jury makes explicit its difficulties, the trial judge must clear away those difficulties with concrete accuracy. Bollenbach v. United States, supra, 326 U.S. at 612-613. A conviction ought not to rest on a equivocal direction to the jury on a basic issue. *Id.* at 613. In the case at hand, the judge's error went beyond that of the trial judge in Bollenbach. The jury's decision on a factual issue clearly hung on the trial judge's reply to their question. The trial judge partially directed the verdict when he relieved the jury of its duty as fact finder. In doing so, the trial judge committed error.

STANDARD OF REVIEW

A. THE ERROR IS A STRUCTURAL ERROR AFFECTING THE FRAMEWORK IN WHICH THE TRIAL PROCEEDS

In analyzing constitutional errors in a criminal trial, this Court has distinguished between "structural error," which involves constitutional deprivations affecting the framework of the trial itself, and "trial error," which occurs during the presentation of the case to the jury and may be quantitatively assessed in the context of other evidence. Arizona v. Fulminante, *supra*, 499 U.S. at 307-310. Trial

error, therefore, is subject to harmless error analysis while structural error, when found, requires that the conviction be overturned. Id. Structural errors have only been found in a limited class of cases, see, e.g., Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (right to an unbiased judge), Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)(right to a public trial), and Sullivan v. Louisiana, *supra* (erroneous reasonable doubt instruction to the jury). This class of cases involves basic constitutional protections, without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Rose v. Clark, 478 U.S. 570, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) The error committed in the case below -- a judge answering a fact-based jury question and thereby partially directing the verdict as to the existence of an element of the charge upon which the jurors could not agree -- rises to the level of a structural error.

After deliberations had begun at petitioner's trial, the jurors, in doubt as to whether petitioner's words were a threat, turned to the judge for an answer to this question. The judge substituted his own belief as to whether this element of the charge had been proven. The circumstances indicate that there was a difference of opinion among the jurors as to whether this element had been proved beyond a reasonable doubt. This situation is analogous to that of a hung jury, unable to reach a decision, asking the judge decide the issue for them. In this situation it is clear that there is reasonable doubt among the

jurors and that they did not resolve that doubt. Thus petitioner was deprived of his right to a trial by jury. As this Court has stated: "[t]he deprivation of [the right to trial by jury], with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error." Sullivan v. Louisiana, *supra*, 508 U.S. at 281-282.

Such a scenario has the same effect on the jury's verdict as the error in Sullivan v. Louisiana, *supra*, in which an unconstitutional definition of reasonable doubt was given. Whether, as in Sullivan, the government's burden of proof was lowered by an initial erroneous instruction or, as here, by a partially directed verdict, the jury was relieved of finding guilt beyond a reasonable doubt on all elements of the offense. In both cases, the ultimate effect on the accused's Sixth Amendment right to a trial by jury is the same.

In United States v. Johnson, *supra*, this Court declined to address the issue of whether a judge deciding whether one element of the offense was proven constituted a substantial error. This question should now be addressed.

Even though the Superior Court, Appellate Department, denied petitioner's state appeal without comment, such a denial can only be the result of a finding that the trial court's error was not a substantial error. This denial necessarily involves a finding, or assumption, that the trial error was not a "structural error" as defined by Arizona v. Fulminante, *supra*, 499 U.S. at 310, because a structural error would require a reversal of petitioner's conviction.

Therefore, the state appellate court must have found that the error was "trial error" which was subject to harmless error analysis under the Chapman standard that the error must be harmless beyond a reasonable doubt. Chapman v. California, *supra*, 386 U.S. at 24. Logic dictates that the state court must have found the error harmless. This conclusion is erroneous.

First, the error at petitioner's trial is a structural error. The argument in Justice Scalia's concurrence to California v. Roy is persuasive. *Supra*, 117 S.Ct. at 339. The jury at petitioner's trial could not decide whether his words contained a threat as required by Penal Code section 71. Unable to reach a consensus, the jury asked the judge for his advice on this factual issue. The trial judge's unequivocal "yes" to a factual question decided the element of the offense that requires the threat to convey an immediate prospect of execution. The judge made this factual determination, not the jury. This action constituted a partially directed verdict on one element of the offense. The jury did not render a verdict on this element of the offense. Nor did the jury verdict effectively embrace this element on other points. Therefore, under the criteria set forth in the concurrence in California v. Roy, the error is not harmless and the appellate court erred by upholding the conviction.

B. ASSUMING THAT THE ERROR IS "TRIAL ERROR," IT SUBSTANTIALLY AFFECTED THE RIGHTS OF THE DEFENDANT AND

REQUIRES REVERSAL UNDER HARMFUL ERROR ANALYSIS.

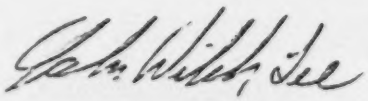
Even if we assume that the error in petitioner's case is "trial error," the Superior Court, Appellate Department, erred in finding the error was harmless. The standard on appeal for trial error is whether the error's contribution to the conviction was harmless beyond a reasonable doubt. Chapman v. California, *supra*, 386 U.S. at 24; Arizona v. Fulminante, supra, 499 U.S. at 307-310 (1991). Trial error has been held to be harmful when a jury instruction presumes malice as a matter of law. Yates v. Evatt, *supra*, 500 U.S. at 411 (fact that victim suffered a single stab wound did not support a rebuttable presumption of malice), see also Francis v. Franklin, *supra*, 471 U.S. at 325-326 (approving Court of Appeals finding of harmful error of presumption in jury instruction). In petitioner's case, the judge's answer to the jury's question had a greater effect on the verdict than a rebuttable presumption. The facts of the case demonstrate that the partially directed verdict was on an element of the offense upon which the jury could not form a consensus. Unlike the cases cited above, the jury here indicated by sending a question to the judge that it was having trouble deciding this element. The members of jury must have had doubt as to whether petitioner uttered a threat. The partially directed verdict decided for the jury an element of the crime that was preventing the jury from reaching a decision. Assuming that harmless error review is the proper standard, the facts demonstrate that this threshold under this analysis is met. One

cannot say that this error was not harmless beyond a reasonable doubt.

CONCLUSION

Whether a violation of the right to have a jury decide all elements of the offense is a Constitutional deprivation that substantially affects the rights of a criminal defendant is an important question that should be addressed by this Court. The jurisprudence of this Court leads up to this question, and the decision in Johnson clearly contemplates that this Court will address the issue at a future date. That time has come. The United States Court of Appeals have a split of authority on the question presented. Such a fundamental issue that lies at the heart of the right to a trial by jury should not be left in its current state of confusion. This Petition of a Writ of Certiorari should be granted to address this important question of law relating to the fundamental Constitutional right to a trail by jury.

Dated: April 13, 1998 Respectfully Submitted,



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APPENDIX A

[TYPED MUNICIPAL COURT JUDGEMENT]

MUNICIPAL COURT FOR THE SAN LEANDRO-HAYWARD JUDICIAL DISTRICT, COUNTY OF ALAMEDA, STATE OF CALIFORNIA

CLERKS DOCKET AND MINUTES

1. DEPT. 06 CRT.DATE/TIME 3/07/97 09:00

2. EVENT NAME SALGURO, STEVEN J. DOCK NO. 311943

3. PROC. FJT CEN. 6123373 PFN. ABW478 A DAY 2/05/96

AAG-SO ACITY HA SJDATE 9/15/97

4. CHARGES COUNTS 1)M71 PC 2)M148(A) PC

STAT BB BAIL $7,500.00 TOTAL DAYS IN CUSTODY: 2

5. BAIL $7,500.00 STAT. BB BOND DT. 02/09/96 BOND

CO.00037 DOB 07/17/49

6. TIME WAIVED TW

PROCEEDING

7. JUDGE GARY PICETTI DEP.D.A. IKUMA

8. DEP. CLERK CINDY WHITT DEF. ATTY. MOCKUS

9. REPORTER KRAW

10. DEF. PRESENT YES ATTY. PRESENT YES

[LINES 11-21BLANK]

BAIL STATUS BAIL EXONERATED *YES*

21. (*) COND SENT: "*@ 9:25 All jurors present & deliberations resume[s]. [sic] Reread by D. Dorn & L. Wright. Jurors retire to deliberate 11:50 A.M. Verdict reached, found guilty, both counts,*

3yrs. (Probation), 100 RT, 10 days Vol. Work, Anger Management Classes, TRO, OAL".

CONTINUATION RECORD

4/14/97

22. DATE *6/9/97*

1630

23. TIME *9:00*

24. DEPT. *06*

25. PROC. *PR/PRVB*

26. DOCKET NAME SALGUERO, STEVEN J *29* CT.DATE 3/07/97

APPENDIX B

[TYPED SUPERIOR COURT APPELLATE RULING]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA, DEPT. 24

Date: December 23, 1997 **Hon.**JOSEPH HURLEY **Presiding Judge**, MARK EATON, KENNETH KINGSBURY,
Patricia Morrison, **Deputy Clerk, Reporter,** not Reported
THE PEOPLE OF THE STATE OF CALIFORNIA vs.
STEVEN J. SALGUERO
Plaintiff/Respondent Counsel appearing for Plaintiff:
James M. Lee DDA
Defendant/Appellant Counsel appearing for Defendant:
R. Winston Albright, Esq.
NATURE OF PROCEEDINGS: RULING OF THE COURT
Action No. 3745 Muni No. 311943
In the above entitled matter, the Court orders the judgment of the trial court affirmed 2-0. Remittitur to issue.

APPENDIX C

[TYPED SUPERIOR COURT APPELLATE RULING]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA, DEPT. 24

Date: January 15, 1998 **Hon**. Kenneth Kingsbury **Presiding Judge**,

John Kraetzer, James Richman

Patricia Morrison, **Deputy Clerk, Reporter,** not Reported

THE PEOPLE OF THE STATE OF CALIFORNIA vs.

STEVEN J. SALGUERO

Plaintiff/Respondent Counsel appearing for Plaintiff:

No Appearance

Defendant/Appellant Counsel appearing for Defendant:

No Appearance

NATURE OF PROCEEDINGS: RULING OF THE COURT

Action No. 3745 Muni No. 311943

In the above entitled action, appellant having submitted a Petition for Rehearing and for certification, comes now the Court and makes the following order:

Petition is hereby denied.